

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 507 of 1997

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

- =====
1. Whether Reporters of Local Papers may be allowed to see the judgements?
  2. To be referred to the Reporter or not?
  3. Whether Their Lordships wish to see the fair copy of the judgement?
  4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
  5. Whether it is to be circulated to the Civil Judge?

-----  
MAULESHKUMAR PANKAJKUMAR YODDHA

Versus

STATE OF GUJARAT

-----  
Appearance:

MR DC DAVE for Petitioner

MS VALIKARIMWALA APP for Respondent No. 1

MR RAMNANDAN SINGH for Respondent No. 2

-----  
CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 29/12/98

ORAL JUDGEMENT

This application under Section 397 CrPC has been preferred by the husband who has been ordered to pay maintenance to his estranged wife by the learned Judicial Magistrate, First Class, Junagadh.

2. The petitioner was married to the respondent no. 2 herein on 2nd May, 1995 at Junagadh. After marriage, the respondent no. 2 went to her matrimonial home and resided with the petitioner and his parents at Ahmedabad. However, she has been estranged from her husband and since 21st May, 1996 she has been residing with her parents at Junagadh. She made an application for maintenance under Section 125 CrPC being Criminal Misc. Application No. 411 of 1996 in the Court of Judicial Magistrate, First Class, Junagadh. The said application was allowed on 15th July, 1996.

3. The petitioner submitted his reply on 16th August, 1996. The respondent no. 2 was examined by her advocate on 31st August, 1996 and was cross-examined by the petitioner on 5th October, 1996 and 27th December, 1996. In course of cross-examination of the respondent no. 2, the petitioner also produced a list of documents at Exh. 18 on 1st November, 1996. On 29th March, 1997, the petitioner submitted a purshis of closing of defence at Exh. 22. On 3rd May, 1997, application Exh. 24 was made. It was contended therein that the petitioner was suffering from mental illness and was of unsound mind, the trial, therefore, be postponed. In support of this application, certain medical certificates were produced, including the certificate of the Mental Hospital at Ahmedabad certifying that the petitioner was treated as an Indoor patient at the said hospital for the period from 19th June, 1996 to 27th January, 1997. These certificates are produced alongwith the list Exh. 18 at Mark 18/18. The learned Magistrate under the impugned judgment and order allowed the application and held that the respondent no. 2 had good reason not to live with the petitioner and that she was entitled to maintenance from the petitioner. It was further found that the petitioner is a qualified Engineer and is serving and drawing monthly salary of Rs. 2000/=. Further, the petitioner had no other family liability. The learned Magistrate, therefore, awarded monthly maintenance of Rs. 500/= to the respondent no. 2. Feeling aggrieved, the petitioner has preferred the present revision.

4. Learned advocate Mr. Dave has submitted that the finding in respect of the income of the petitioner recorded by the learned Magistrate is erroneous and perverse. There is no evidence whatsoever to justify the said finding. Besides, the petitioner being of unsound mind, he could not defend the application for maintenance and the learned Magistrate ought not to have proceeded further without deciding application Exh. 24. Further, the learned Magistrate has recorded that the application

Exh. 24 was rejected, however, the same is not true. Application Exh. 24 has not been decided at all and the learned Magistrate has erroneously proceeded on the basis that the said application was rejected. Mr. Dave has contended that so long as Application Exh. 24 was not decided by the learned Magistrate, the learned Magistrate, in view of the provision contained under Section 328 CrPC, ought to have postponed the trial. Mr. Dave, in support of his contention, has relied upon judgment of the Madras High Court in the matter of Appichi Goundan v. Kuthujummal [1925 Madras 440].

5. Mr. Ramnandan Singh, learned advocate appearing for the respondent no. 2 has contested this application. He has submitted that the petitioner is not of unsound mind and he has defended the application made by the respondent no. 2 for maintenance effectively. Besides, Application Exh. 24 was made with a view to delaying the trial and denying the maintenance to the respondent no. 2 herein. Besides, proceeding under Section 125 CrPC having no penal consequences, Section 328 CrPC is not attracted. Mr. Singh has further contended that the respondent no. 2 is willing to reside with the petitioner, however, the parents of the petitioner are over-indulgent and do not allow the petitioner to consummate the marriage. The respondent no. 2, therefore, should atleast get the monthly maintenance from the petitioner.

6. Upon perusal of the record, it does appear that the application Exh. 24 has not been decided by the learned Magistrate. However, the learned Magistrate has proceeded on the basis that the said application was decided and rejected before the impugned judgment was delivered. The question that, therefore, arises is whether the learned Magistrate could have proceeded further without deciding application exh. 24, as contemplated under Section 328 CrPC. Section 328 CrPC provides for procedure to be followed in case of accused being lunatic. Section 328 CrPC reads as under :-

Sec. 328 Procedure in case of accused  
being lunatic - [1] When a Magistrate holding an inquiry has reason to believe that the person against whom the inquiry is being held is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness of mind, and shall cause such person to be

examined by the Civil Surgeon of the District or such other Medical Officer as the State Government may direct, and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to the writing.

[2] Pending such examination and inquiry, the Magistrate may deal with such person in accordance with the provisions of Section 330;

[3] If such Magistrate is of opinion that the person referred to in sub-section [1] is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case."

Mr. Dave has contended that the inquiry contemplated under Section 328 CrPC is in respect of any inquiry being made by the Criminal Court which is governed by the provisions of the Code. The proceedings under Section 125 CrPC being governed by the provisions of the Code is an inquiry contemplated under Section 328 CrPC and the learned Judge should not have proceeded further with the matter untill Application Exh. 24 was decided and if the petitioner was found to be of unsound mind, the learned Magistrate ought to have postpone further proceedings of the matter. Mr. Singh has disputed this proposition and has contended that the provisions contained under Section 328 CrPC relates to the prosecution alone which have penal consequences. There being no penal consequences in the proceedings under Section 125 CrPC, Section 328 CrPC shall not apply. He has further contended that on the facts of the case, it cannot be said that the petitioner was incapable of making his defence, therefore also, there was no need for the learned Magistrate to postpone further proceedings.

7. In the matter of Appichi Goundan [Supra], the Madras High Court was considering a case where under the proceedings under Section 125 CrPC [Section 488 of the old Code], the Magistrate had appointed guardian adlitem to defend the case on behalf of a person who was found to be of unsound mind. The court held that, `.....the proceedings under Section 488, may be quasi-civil but they are also criminal and are wholly governed by the

provisions of the Criminal Procedure Code alone'. The Court further held that, 'the procedure adopted by the learned Magistrate was erroneous.' It was the Magistrate's duty to hold a judicial enquiry into the sanity of the petitioner and put him, if necessary, under medical observation.' Thus, the Madras High Court has held that the provisions contained in Section 464 [of old Code] should apply to proceedings for maintenance as well. I am in complete agreement with the view taken by the Madras High Court. The proceeding under Section 125 CrPC being governed by the Code, the provisions contained in Section 328 shall also apply with full force. However, I do not agree with the contention that the inquiry contemplated under Section 328 is any inquiry pending before the Criminal Court. I am of the view that the inquiry referred in Section 328 CrPC is the one which a Magistrate is required to undertake when he has reason to believe that the defendant is of unsound mind and consequently incapable of making his defence. Thus, the inquiry contemplated is the one in respect of determination of soundness/unsoundness of the mind of the person concerned. The belief has to be formed by the Magistrate on the facts of the case. The said provision can be invoked provided the person concerned is incapacitated of making his defence on account of unsoundness of mind.

8. In the present case, it is apparent that the petitioner had attended the trial and the learned Magistrate had not found him of unsound mind or incapable of defending himself. In fact, as referred to hereinabove, pursuant to the summons issued by the Court, the petitioner had entered his appearance and had also submitted his written statement. Perusal of the written statement also makes it clear that the petitioner had understood the case put up against him and had taken cogent defence. He also cross-examined the respondent no. 2. The application Exh. 24 was filed only after he had closed his defence. Besides, the medical certificates produced by him not only are not proved but they indicate that on the dates of submission of the written statement and the examination of the respondent no. 2, the petitioner was being treated as an Indoor patient at the mental hospital. Prima facie, the said certificates do not appear to be genuine. The application Exh. 24 appears to have been filed with an ulterior motive and with a view to delaying the proceedings. Though the learned Judge had not made any order on the said application Exh. 24, and before proceeding further, he ought to have made order on the said application Exh. 24, the error committed by the

learned Magistrate, in my view, is not such which should vitiate the proceedings. It is obvious that the learned Magistrate also found the said application Exh. 24 was filed with an ulterior motive. Since the petitioner has effectively defended the case before the learned Magistrate, the question of his being incapable to make his defence on account of unsoundness of his mind does not arise. He, therefore, is not required to be referred to the Civil Surgeon nor any elaborate inquiry is required to be made in respect of unsoundness of his mind, as contemplated under Section 328 CrPC. Further an enquiry of unsoundness of mind of a person under section 328 CrPC is required to be made only if the person is incapable of making his defence on account of unsoundness of mind. A mental illness of a person which has not incapacitated him of making his defence would not call for an enquiry contemplated under section 328 CrPC. I, therefore, do not see any reason why the matter should be remanded, as urged by Mr. Dave, for deciding the application Exh. 24, after making elaborate inquiry under Section 328 CrPC. Further, at this stage also, the petitioner is not required to be referred to the Civil Surgeon as contended by Mr. Dave. The defence of unsoundness of mind is clearly an after-thought and has obviously been taken with a view to avoiding liability to pay maintenance to the respondent no. 2. The request, therefore, requires to be rejected.

9. In respect of the finding recorded with regard to the income of the petitioner, I must say that the learned Magistrate has relied upon the appointment order/letter issued to the petitioner offering him monthly salary of Rs. 2000/-. The finding recorded on the basis of the appointment letter cannot be said to be erroneous or perverse as contended by Mr. Dave. Considering the income of the petitioner and that he has no other family liability, the monthly maintenance of Rs. 500/= awarded to the respondent no. 2 need not be interfered with.

10. For the reasons recorded hereinabove, revision application is dismissed. Rule is discharged. There shall be no order as to costs.

\*\*\*\*

Prakash\*